(1)

Supreme Court, U.S.
FILED

011250 FEB 8 2002

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NO.

In The
Supreme Court Of The United States

MIRIAM DONNER,

Petitioner,

vs.

WILLIAM DONNER, EDWARD DONNER, and MARK DONNER, as personal representatives of Estate of Charles Donner, deceased, and FOURTH DISTRICT COURT of APPEAL of FLORIDA,

Respondents

On Petition For Writ Of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

A Florida state-appeals-court panel, including Judge Mager, affirmed a judgment in favor of Charles Donner and against Miriam Donner. Six days later, Mager resigned and joined a law firm that represented Charles Donner regarding the subject matter of that suit. Twenty years later Miriam Donner discovered that firm's employment of Mager and that the employment was negotiated before the affirmance. The state court refused to recall its mandate since it had lost jurisdiction at the end of the term in which its mandate was issued. Miriam Donner sued in federal court to void the state-court appellate decision claiming that Judge Mager's participation in the appeal violated due-process. Her § 1983 complaint was dismissed and that dismissal was affirmed, citing the *Rooker-Feldman* doctrine, allegedly because she had a "reasonable opportunity" to discover Mager's employment in time to raise the due-process issue in state court via rehearing or certiorari.

1. Did the Eleventh Circuit standard, barring claims simply because a party allegedly had a "reasonable opportunity" to discover facts relating thereto, conflict with the *Rooker-Feldman* doctrine, barring only those claims that were "raised" and heard, or that the party "failed" to raise, in state court?
2. Is a finding that a party had a "reasonable opportunity" to discover facts relating to an issue dispositive of whether, under *Rooker-Feldman*, she "failed" to raise that issue where she was under no duty to search out those facts in the state court proceeding and hence was not "at fault" in not doing so?
3. Is a party at fault in not discovering, and raising in state court, the facts relating to a judge's disqualification, where the judge himself "neglects" to disclose those facts to that party?
4. Did the Eleventh Circuit violate *Rooker-Feldman* by depriving Petitioner of any forum in which to raise her claim where she was not at fault in not discovering the issue and in fact could not have done so in time to have it heard in state-court appeal?

LIST OF ALL PARTIES IN PROCEEDING BELOW

MIRIAM DONNER

WILLIAM DONNER, EDWARD DONNER, and MARK DONNER, as personal representatives of the Estate of Charles Donner, deceased,

FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI

Petitioner Miriam Donner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The March 12, 2001 order of affirmance is reported as *Donner v. Donner*, 252 F.3d 442 (11th Cir. 2001), but the opinion was not published. The judgment of the district court was not published or reported. Those orders are reproduced at App. 8-10 and 6-7.

STATEMENT OF JURISDICTION

Under 28 U.S.C.A. § 1254(1), jurisdiction is conferred on this Court to review by certiorari the U. S. Court of Appeals for the Eleventh Circuit's affirmance of the judgment of the U. S. District Court for the Southern District of Florida. The opinion of affirmance was issued on March 12, 2001 (App. 1-4). A timely petition for rehearing was served and filed on March 29, 2001 and that petition was denied on November 13, 2001 (App. 5).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution, amendment I, in pertinent part, provides:

> "Congress shall make no law ... abridging the right of the people ... to petition the Government for redress of grievances."

U. S. Constitution, amendment XIV, in pertinent part, provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law: ..."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

28 U.S.C. § 1257, in pertinent part, provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution ...

28 U.S.C. § 1331 provides:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a), in pertinent part, provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> * * *
> (4) To ... to secure equitable or other relief under any Act of Congress providing for the protection of civil rights..."

Florida Appellate Rule 3.14, in effect in 1977, in pertinent part, provided:

> a. Time For. Unless further time is allowed, rehearings must be applied for by petition in

writing within 15 days after the filing of the decision or order of the Court.

* * *

e. Only One Petition Allowed. The petitioner shall be entitled to file only one petition for rehearing with respect to the particular decision and no further petition or motion will be received or filed by the clerk or considered by the Court.

STATEMENT OF THE CASE

In federal district court, Miriam Donner sued William, Edward, and Mark Donner, as personal representatives of the Estate of Charles Donner, deceased, and the Fourth District Court of Appeal of Florida under 42 U.S.C. § 1983 for declaratory relief. Her complaint alleged that the court of first instance, the federal district court, was vested with jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(4) and that complaint further alleged the following facts:

1. In 1976, Miriam Donner, as the wife of Charles Donner, sued him in Florida state court for separate maintenance (Complaint, ¶ 4; see App. 2) In that case, that court entered a judgment of dismissal on the stated ground that the parties were ***not*** husband and wife. (Complaint, ¶ 5; see App. 2) The effect of that judgment was to bar Miriam Donner's claimed marital right to support and her right of inheritance as surviving spouse when Charles Donner later died. (Complaint, ¶ 6)

2. In Appeal Case No. 76-1708, Miriam Donner appealed the aforementioned judgment to the District Court of Appeal of Florida, Fourth District. (Complaint, ¶ 7; see App. 2)

3. On August 9, 1977, a three-judge panel of that Court,

consisting of Judges Alderman, Mager, and Dauksch, unanimously affirmed that judgment *per curiam* without opinion.(App. 11; complaint, ¶ 9) That panel comprised a quorum of that Court.[1] Rehearing was denied by September 15 and 21, 1977 orders. (Complaint, ¶ 12)

4. The Florida Supreme Court denied without opinion Miriam Donner's petition for writ of certiorari, seeking review of that Fourth District Court of Appeal decision. (Complaint, ¶ 13) Thereafter, on February 17, 1978, the district court of appeal issued its mandate of affirmance. (*Id.*, ¶ 14) *Donner v. Donner*, 349 So.2d 1240 (Fla. Dist. Ct. App. 1977), *cert. denied*, 365 So.2d 724 (Fla. 1978). (*Id.*, ¶ 15)

5. In 1997, Miriam Donner discovered for the first time that, at some time prior to August 15, 1977, Judge Mager had already agreed to join a law firm -- Abrams, Anton, Robbins, Resnick & Schneider. That August 15, 1977 date was just four business days after the August 9, 1977 date of the appellate panel's order of affirmance. That law firm had for several years been representing, and in July and August, 1977 continued to represent, Charles Donner on an ongoing basis with regard to the subject matter of Miriam Donner's separate maintenance claim. (*Id.*, ¶ 16)

6. Paragraph 22 of the complaint alleged:

> (c) Upon learning of Mager's association with that firm, Miriam Donner initiated a search of the public Florida corporate filings to

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[1] At the time of that appeal, Fla. Const., art. V, § 4(a) provided, "Each district court of appeal shall consist of *at least three judges*. Three judges shall consider each case ..." (Italics supplied)

determine when Judge Mager joined that firm.
(d) As a result of that search, in October, 1997, Miriam Donner learned that, on August 30, 1977, that law firm had filed with the Secretary of State "Articles of Amendment." ...
(e) Those Articles recited that, "on the 15th day of August, 1977," the shareholders of that firm adopted an amendment, changing the name of the firm from "Abrams, Anton, Robbins, Resnick and Schneider, P.A." to "Abrams, Anton, Robbins, Resnick, Schneider **and Mager**, P.A." (emphasis supplied).
(f) The "Mager" whose name was added to the "P.A." was the same Gerald Mager who was the judge on the aforementioned district-court-of-appeal panel.

7. Since Judge Mager tendered to the Governor of the State of Florida a July 13, 1977 letter of resignation effective August 15, 1977, at least by July 13, 1977, Judge Mager's post-resignation plans for employment as a name member of Anton's law firm had already been concluded, or alternatively the discussions and negotiations relating thereto spanned a period that overlapped the period when Judge Mager participated in the deliberations in regard to the three-judge panel's order of affirmance and included the time when he cast his vote in that case. (*Id.*, ¶¶ 23 & 24)

8. Upon making that discovery in 1997, Miriam Donner immediately moved in the Fourth District to recall the mandate of affirmance based upon the aforementioned newly-discovered facts. (*Id.*, ¶ 17)

9. On December 23, 1997, in Case No. 76-1708, a panel of judges of the Fourth District (different from the judges who comprised the panel presiding in 1977) denied Miriam Don-

ner's motion to recall its mandate, holding that "[a]n appellate court is without jurisdiction to recall its mandate beyond the term of court during which the mandate was issued." (*Id.*, ¶ 25)[2]

10. Petitioner's ensuing petition to the Florida Supreme Court for discretionary review of the Fourth District Court of Appeal order (denying her motion to recall the mandate) was denied without opinion, without determining the merits of any issue. (*Id.*, ¶ 39)[3]

11. On May 5, 1998 Miriam Donner filed in the Florida Supreme Court a petition for writ of mandamus requiring "... the Fourth District to accept jurisdiction of Appellant Miriam Donner's motion to recall mandate and determine that motion on its merits." The Florida Supreme Court denied that petition without opinion, again without determining the merits of any issue. (*Id.*, ¶¶ 40-41; see App. 2)

12. Petitioner's petition for writ of certiorari to the U.S. Supreme Court, seeking review of the Fourth District order denying her motion to recall the mandate, was denied. *Donner v. Donner*, 525 U.S. 1002, reh. denied 525 U.S. 1095 (1999) (*Id.*, ¶ 42; see App. 2)

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[2] The Eleventh Circuit opinion in the case at bar likewise states:

> "[T]he court denied the motion noting that it was without jurisdiction to recall a mandate beyond the term of the court when the mandate was issued." (App. 2)

[3] These same facts are reiterated in the Eleventh Circuit opinion. (App. 2)

13. Paragraph 44 of the complaint alleged:

"[A]s a result of Judge Mager's discussions and negotiations for employment with, and his employment by, the said law firm, he had a substantial interest, pecuniary and/or professional, adverse to Miriam Donner, in the outcome of the aforementioned appeal when he contemporaneously participated in the deliberations of the appellate panel and in the appellate order of affirmance.

(a) His participation with the other judges on that panel in their deliberations and in their affirmance likewise prejudiced and disqualified those judges and the entire panel with that same taint.

(b) Those circumstances rendered the said appellate decision and appellate mandate so egregious as to strike at the very foundation of the judicial system and at basic notions of fairness, violative of Miriam Donner's right to an impartial tribunal, guaranteed to her under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and her right to petition the Courts for redress under the First Amendment.

(c) Those due process and First Amendment violations were rendered all the more egregious by the ongoing failure of the Fourth District Court of Appeal, of Judge Mager, of the Abrams, Anton law firm, of opposing counsel, and of Charles Donner to disclose the relevant facts to Miriam Donner.

14. Paragraph 45 of the complaint alleged:

> (a) Judge Mager's participation in the panel's deliberations and affirmance not more than four business days before the Abrams, Anton law firm formally changed its name to include that of Judge Mager, and
> (b) the failure of that law firm, of Judge Mager, of opposing counsel, and of Charles Donner to disclose that employment or the negotiations leading to that employment or the timing thereof to Miriam Donner, failed to "satisfy the appearance of justice" and instead generated an appearance of impropriety so egregious as to strike at the very foundation of the judicial system and at basic notions of fairness and thereby likewise constituted a denial of due process, violative of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and of the First Amendment.

15. The complaint further alleged:

> In light of the Defendant Court's stated position that it lacks jurisdiction (after expiration of the term of court in which its mandate was issued) to recall its mandate, Miriam Donner has been deprived of any opportunity, meaningful or otherwise, to have a Florida state court consider or adjudicate the due-process and First Amendment issues, with regard to which declaratory judgment is sought herein, on the merits. (*Id.*, ¶ 48)

16. That complaint concluded with the following prayer:

> Plaintiff demands judgment
>
> (a) declaring that the August 9, 1977, September 15, 1977, and September 21, 1977 orders of the Fourth District, [and] its ensuing February 17, 1978 mandate of affirmance in Case No. 76-1708 were denials, under color of state law, of Plaintiff's property rights and right of access to the Courts, violative of the procedural and substantive due process guarantees under the Due Process Clause of the Fourteenth Amendment of the U. S. Constitution and of the First Amendment right to petition the court for relief, and as such were void, thereby leaving pending for resolution in the Fourth District the merits of Miriam Donner's appeal of the Broward Circuit Court judgment to the Defendant Court in Case No. 76-1708, and
>
> (b) for such further relief as this Court may deem just and proper.

(*Id.*, pp. 16-17) Absent from the complaint was any prayer for monetary relief.

The federal district court clerk entered default against the personal representatives of the Charles Donner estate. The Fourth District moved to dismiss the complaint based on the *Rooker-Feldman* doctrine. (App. 8) Citing that doctrine, the court granted that motion. That court opined, "The basis of Plaintiff's Complaint is that the state appellate court deprived her of her constitutional rights by refusing to recall its 1978 mandate." (App. 9) Miriam Donner's motion for rehearing of that order was denied. That order characterized her as trying to "shoehorn" her claim into an exception to the *Rooker-Feldman* doctrine and opined that "she is in effect appealing the 1997

state court decision denying her relief on her claims concerning the 1977 decision to the district court." (App. 6-7) Pursuant to 28 U.S.C. § 1291, she appealed that dismissal.

The Eleventh Circuit affirmed that judgment, again relying on the *Rooker-Feldman* doctrine. However, that Court departed from the district court's view, that Miriam Donner's complaint was seeking review of the December 23, 1997 order, by opining instead that her complaint was seeking review of the August 9, 1977 opinion. In support of its decision, the Eleventh Circuit reasoned that the names of the Fourth District judges on the panel that issued that opinion were known to Petitioner and that

> [A]ccording to her own admission, she could have discovered that the law firm had filed articles of amendment with the secretary of state, making the former judge a named partner. With this information, Plaintiff could have included her due process claims in a petition for rehearing or in a petition for certiorari ... While Plaintiff may not have had actual knowledge of the judge joining the law firm, she at least had a reasonable opportunity to learn the facts necessary to bring her due process challenge. Resources of a party making an appeal are limited. Just because Plaintiff did not investigate the potential grounds for the judge[']s recusal does not mean that she did not have a reasonable opportunity to do so.

(App. 4) In regard to the above-quoted reference to Miriam Donner's alleged "own admission," her *only* "admissions" concerning the articles of amendment are those set out in ¶ 22 of the complaint, quoted in ¶ 6 at pp. 4-5 *ante.*, as to the substance of the amendment that the articles approved, as to the August 30, 1977 date of filing of those articles, and as to

Miriam Donner's discovery of those articles in 1997. Neither in the complaint nor otherwise did Miriam Donner allege or "admit" that she was ever alerted to Judge Mager's employment at any time before 1997. [Complaint, ¶¶ 44(c) and 45(a), quoted *ante* at pp. 6-7] To the contrary, her complaint alleges that in 1997 she was for the first time apprized of that employment and prompted to search out and discover Mager's law firm's public filings. (See ¶¶ 5 and 6 at pp. 4-5 *ante*).[4]

REASONS FOR GRANTING THE PETITION

1. The federal questions are important

The *Rooker-Feldman* doctrine and its interpretation have presented oft-recurring federal jurisdictional issues in the federal courts. The various circuits have adopted a diversity of standards under that doctrine. The Eleventh Circuit's "reasonable opportunity" standard and decision conflicts both with the standards announced in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) (doctrine bars only those issues that were raised and heard, or that claimant "failed" to raise, in state court), and with *Williams v. Taylor*, 529 U.S. 420, 431-432 (2000) (party "fails" to raise an issue in state court only if he was under a duty to discover the facts relating thereto),

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[4] The Eleventh Circuit opinion does not specify where in the record that alleged "admission" appears. Since the judgment under review granted a motion to dismiss the complaint, the Eleventh Circuit was presumably referring only to allegations of the complaint. Nowhere in the record did Miriam Donner make any allegation concerning the Articles of Amendment that elaborated upon, or differed in any way from, the allegations of ¶ 22 of the complaint, fully quoted *ante* in ¶ 6. And since the Eleventh Circuit opinion, rendered on its "Non-Argument Calendar" (App. 1), confirms that there was no oral argument, no such "admission" may be attributed to any statement made at an oral argument.

Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 864 (1988) (duty rests on judge to disclose, not party to ferret out, disqualifying facts) and *Gibson v. Berryhill*, 411 U.S. 564, 575-577 (1973) (no cognizable comity interest exists in a biased state-tribunal proceeding)

The special importance of the Eleventh Circuit's departure from *Rooker-Feldman* is that it effectively deprives an aggrieved person, who is under no duty to discover a state-court's constitutional due-process violation, of any forum, state or federal, past, present, or future, in which to remedy that violation simply because he *could* have discovered those facts. Any such version of *Rooker-Feldman* that would bar all avenues of judicial relief from a due-process violation, would give rise to "serious constitutional questions." *Brown v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986), citing Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953); *see also Felker v. Turpin*, 518 U.S. 651, 667 (1996) (Stevens, Souter, and Breyer, JJ., concurring).

That "serious constitutional question" is here germane because, in the course of Miriam Donner's 1977 state-court appeal, she had no knowledge of the facts disqualifying the state-court judges that gave rise to her due-process claim and those judges themselves neglected to disclose those facts to her. Thus, she was under no duty to discover or to raise that claim in that appeal or via a certiorari petition to this Court seeking review of that appellate decision. Yet, the Eleventh Circuit nailed shut the door to the *only* available avenue of relief, the federal district court.

This Court's resolution of that question is rendered all the more important to our dual federal-state court system in light of the fact that the due-process violation that Miriam Donner seeks to remedy will require the federal court to declare void the state-court appellate decision.

It is essential that state courts and their judges be placed clearly on notice by this Court that they cannot conceal,

and thereby evade federal-court scrutiny of, their disqualifying due-process violations.

2. The Eleventh Circuit decision conflicts with relevant decisions of this Court and of the Fifth Circuit

A. The Eleventh Circuit decision conflicts with decisions of this Court in *Feldman, Williams, Liljeberg,* and *Gibson* and with that of the Fifth Circuit in *Womack*

This Court's decision in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) -- the second half of the *Rooker-Feldman* doctrine -- holds that federal district courts lack jurisdiction over "constitutional claims" that "are inextricably intertwined with the state court's" decision. That footnote 16 sets out a two-prong standard, explaining that the jurisdictional bar applies where the issue

(a) was "raised" and heard on the merits in the state-court proceeding, or

(b) was "failed to be raised" in that proceeding.

Feldman's underlying facts illustrate the first prong of that standard. In *Feldman*, the petitioners were, in the course of an antecedent District-of-Columbia bar proceeding, fully cognizant of the facts that formed the basis of their federal claims and did in fact "raise" those federal issues in that proceeding (wherein those issues were heard). The first prong of that standard is here inapplicable because the Eleventh Circuit itself contrastingly notes Miriam Donner's lack of knowledge of the facts upon which her federal claim was later based (App. 4) and the fact that she did not "raise" that claim in state court.

(1) Feldman's "failed-to-be-raised" standard bars only those federal issues that a party had a duty to raise in state court

There remains then to be considered the second, "failed-to-be-raised" prong of *Feldman*'s standard. The word "failed" has more recently been construed by this Court in *Williams v. Taylor*, 529 U.S. 420, 431-432 (2000), in the context of a statutory provision concerning one who "has failed to develop the factual basis of a claim in State court proceedings." *Williams*, 529 U.S. at 431-432, holds that the "ordinary, ... common meaning" of the word "failed" "connotes some omission, fault, or negligence on the part of the person who has failed to do something," a failure to "take the necessary steps to fulfill" "a duty." *Feldman* likewise invokes the word "failed" in its "ordinary" sense. Therefore, Miriam Donner can be said to have "failed" to raise her federal issues in state court ***only*** if she was "at fault" in that regard – only if she was in breach of some "duty" to discover the disqualifying facts relating to Judge Mager and to raise those facts in the state court.

The Eleventh Circuit opinion below replaces the second prong of *Feldman*'s standard with its own conflicting standard, that it was enough that Miriam Donner allegedly "*could have discovered*" the Articles of Amendment and would thereby have had "a reasonable opportunity" to raise her federal claim in the state-court proceeding. That different standard eliminated any consideration of whether she "failed" or, in other words, was in breach of some "duty" (and therefore "at fault") in not raising her federal claim in state court. Accordingly, the standard that the Eleventh Circuit adopted conflicts with *Feldman*'s foregoing standard, as well as with *Williams*.

(2) *Under* Liljeberg *and* Williams, *party is under no duty to search public records to discover disqualifying facts*

That conflict is of real significance in this case because, in fact, no such "duty" was imposed on Miriam Donner or violated by her in her state-court appeal. That conclusions is impelled by the following two decisions of this Court:

i. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 864 (1988), held that the mere fact that a judge's financial disclosure forms were on file in a public record did not place the litigants on notice of disqualifying facts disclosed therein – because the duty rests ***on a judge*** to disclose disqualifying facts, not on litigants to ferret those facts out of public records. Any "neglect" in that regard "is chargeable to" the judge, not to the litigants. *Id.* Miriam Donner's complaint pointed out that the state-court judges did not perform their duty of disclosure. (Complaint, ¶ 45(b), quoted in ¶ 14, at p. 7 *ante*) Indeed, the facts, as alleged in Miriam Donner's complaint would, if true, have imposed an even broader, overarching responsibility on Judge Mager to disqualify himself *sua sponte*, without a need for any party to raise the issue in the state-court proceeding – a duty that he did not fulfill.

ii. *Williams v. Taylor*, 529 U.S. at 440, likewise held that counsel was under no duty to search through public records to ferret out a state-court juror's disqualifying personal information – and that he therefore cannot be said to have "failed" to have develop that information in state court.

Thus, the Eleventh Circuit's inquiry, limited just to whether Miriam Donner *"could"* have discovered those facts through her own independent research, missed the mark. Under *Feldman*, it is rather the fact that she had no knowledge of those facts – and therefore no duty to raise the federal issue in state court – that is dispositive. Accordingly, the

Eleventh Circuit standard conflicts with *Feldman's* standard as well as with the aforementioned holdings in *Liljeberg* and *Williams*.

> **(3) *Under* Liljeberg *and* Womack, *Miriam Donner could nothave been expected to search public records for the Articles of Amendment without knowledge of Mager's employment***

There is yet another dimension to that conflict, as follows.

Liljeberg, 486 U.S. at 864, characterized a litigant's search of "the judge's financial disclosure forms" as an "***unusual*** step" even though those "financial disclosure forms" would naturally have been readily retrievable through a public records index search directly under the name of the judge in *Liljeberg*. By contrast, the law firm's Articles of Amendment, reflecting the addition of Mager as a member of that firm, would naturally have been indexed in the Secretary of State's records under the name of the firm, Abrams, Anton, Robbins, Resnick, Schneider & Mager, P.A., not under Mager's name, and as such would in 1977 not have been discoverable by searching that index under his name. Miriam Donner would have had to be clairvoyant to initiate an index search under that firm name or even to have conceived of searching the records of the Secretary of State. Nothing in Miriam Donner's complaint suggests otherwise. Indeed, the complaint affirmatively alleges that neither the Fourth District, nor Mager, nor the opposing party imparted any information to her in that regard. [Complaint, ¶¶ 44(c) and 45(a) quoted *ante* at pp. 6-8]

Thus, a search of the Secretary of State's records to find the August 30, 1977 filing would have to be characterized as an even more "unusual step" than was the direct search in *Liljeberg* – and hence was a step that Miriam Donner could not "reasonably" have been expected to undertake at any time before she gained knowledge thereof in 1997.

This same logic was applied by the Fifth Circuit in *United States v. Womack*, 454 F.2d 1337 (5th Cir. 1972), *cert. denied*, 414 U.S. 1025 (1973). *Womack*, 454 F.2d at 1341, held that a litigant was *under no duty to discover* grounds for disqualification evidenced by a transcript, previously included as a public record in the record of another case, on "the day it became a public record," absent knowledge of facts that would have led him to initiate a search for that transcript.

(4) Even if Articles of Amendment would have been discovered on the date they were filed, no timely motion for rehearing could have been filed in state court raising that issue

Even without regard to any of the foregoing considerations, discovery of the articles of amendment before the time for rehearing expired would not have enabled Miriam Donner to have a "full hearing" concerning Judge Mager's disqualification. Those articles related only to Judge Mager's employment status on August 15, 1977, after the August 9, 1977 opinion was issued. Only with the benefit of the additional facts alleged in Miriam Donner's federal district court complaint, that relate Judge Mager's pre-employment negotiations with the law firm back to the date when that opinion was issued, would she have been able to prove those disqualifying facts and her due-process claim. Analogously, in *Liljeberg*, 486 U.S. at 864, it was noted that the financial disclosure forms available for inspection in the public records would not alone have been sufficient, because although it disclosed the judge's connection with a University, it did not disclose whether that connection existed while the University was negotiating with Liljeberg.

One must hasten to add that, even if Miriam Donner would by sheer serendipity have happened upon those articles and all of the other needed information on the same day the articles were filed, the deadline for filing a motion for rehear-

ing raising a claim in regard thereto in the state-court appeal would by then have already expired. Since the panel opinion in which Judge Mager participated was issued on August 9, 1977 (App. 11), Miriam Donner's motion for rehearing of that opinion was mandated to be filed within 15 days, not later than August 24, 1977 -- six days *prior* to the August 30, 1977 date of filing of those articles. The then-applicable Florida Appellate Rule 3.14, quoted at pp. 2-3 *ante*, limited a party to just one motion for rehearing filed not later than 15 days after the order to which it is directed. Nor could Miriam Donner have circumvented that deadline by filing a later "supplement" to a timely motion for rehearing; *Morgan v. Amerada Hess Corp.*, 357 So.2d 1040, 1045 (Fla. Dist. Ct. App. 1978) construed that Rule as allowing a supplement only if both the original motion and supplement thereto were filed before the 15-day deadline expired. It would have been chronologically impossible for Miriam Donner to comply with that requirement.

(5) Comity concerns for state interests under Feldman do not apply where state tribunal is biased

One final feature that distinguishes the case at bar from *Feldman* arises out of the closing comments in *Feldman*'s footnote 16. That footnote notes the "importance" to *Feldman*'s analysis of "the state interest in regulating the state bar." *Gibson v. Berryhill*, 411 U.S. 564, 575-577 (1973) held that comity considerations that would otherwise require deference to state interests do not apply in the face of facts showing that the state tribunal is biased -- the very essence of Miriam Donner's due-process claim. Hence, yet another conflict with *Feldman* (and *Gibson*). That issue is further discussed in Argument 2B(2) *post*

B. The Eleventh Circuit decision conflicts with that of this Court in *Rooker*

The first half of the *Rooker-Feldman* doctrine, upon which the Eleventh Circuit relied, is *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The Eleventh Circuit's reliance on *Rooker* was likewise misplaced and in fact conflicted with *Rooker*. In *Rooker*, a bill in equity made the following several "charges":

> **(1) *Rooker's first set of charges were known to him in time to be raised and fully heard in state court***

The first set of charges was that, in a prior state-court proceeding, a judgment "gave effect to a state statute alleged to be in conflict with "the "contract clause of the Constitution" and "the due process of law and equal protection clauses" and did not give effect to "the law of the case." *Rooker*, 263 U.S. at 415, observed:

> "[The state] circuit court had jurisdiction of both the subject-matter and the parties, that a ***full hearing*** was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs."

(Emphasis supplied) Based on those observations, *Rooker*, 263 U.S. at 415-416, declined to address the merits of those charges, reasoning:

> "If the decision was wrong, that did not make the decision void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding... Under the legislation of Congress, no court of the United States other than this court could entertain a

proceeding to reverse or modify the judgment for errors of that character."

Rooker conflicts with the Eleventh Circuit's treatment of the allegations of Miriam Donner's complaint at every step in the foregoing analysis. Her complaint alleged facts showing that,

(a) in her 1977 appeal,

(i) there was by contrast no hearing, "full" or otherwise, on the (due-process) issues relating to Judge Mager's disqualification,

(ii) the state-court decision by contrast made no ruling on, and "was not responsive to," those issues,

(iii) Her lack of knowledge of the disqualifying facts and the state judges' failure to disclose those fact contrasted with Rooker's knowledge of the facts giving rise to those federal issues in the state-court proceeding and with Rooker's ability to seek "reversal or modification in an appropriate and timely appellate proceeding" in state court, and,

(b) indeed, when, in 1997, Miriam Donner finally gained knowledge of those facts, the state court contrastingly held that, in the interim, it had lost all "jurisdiction." (App. 2)[5]

---

[5] These same observations are equally dispositive of the federal district court's reasons, different from those of the Eleventh Circuit, for invoking *Rooker-Feldman* in the case at bar. Already noted, *ante*, at p. 9, is the fact that the federal district court misconstrued the complaint as seeking review of the Fourth District's 1997 order, denying the motion to recall mandate. (App. 8-9) Since that order was based on a ruling that the Fourth District lacked "jurisdiction" to recall its mandate (and therefore could not hear the federal issues on the merits), the federal district court's reasoning is equally at odds with *Rooker*'s above-quoted criteria. The federal district court's initial order (App. 9) additionally relied on an abbreviated reference to the *Rooker-Feldman* doctrine in *Johnson v. DeGrandy*, 512 U.S. 997, 1005-1006 (1994). In regard to that doctrine, *Johnson*'s only holding was that that doctrine was inapplicable where the claimant was not a party to the prior state-court proceeding.

(2) *In contrast to the Eleventh Circuit decision,* Rooker *considered on the merits the charge that state-court appellate judge was disqualified*

These observations are also relevant to the separate discussion in *Rooker*, 263 U.S. at 416-417, of the bill's further "charge," that the state-supreme-court affirmance was "void" because one of the judges, "participating" in the state-court appellate proceeding "had an interest in the case which worked his disqualification." *Rooker*, 263 U.S. at 417, contrastingly addressed, and disposed of, that charge ***on its merits*** by ruling that "the facts set forth and relied upon neither support nor tend to support the charge..." of disqualification. *Rooker*'s separate treatment of that issue may have been prompted by a concern that a "full" – and fair – "hearing" on that issue would not have been available in the state court if, in fact, bias existed. *Compare Gibson*, 411 U.S. at 575-577, that also looked to the merits of the allegations of state-tribunal bias in determining whether to abstain from exercising federal jurisdiction; and see Argument 2A(5) *ante*. Though the disqualifying facts alleged in the complaint at bar markedly differ from those alleged in Rooker's bill, it is noteworthy that Miriam Donner's complaint also charges that the state-court appellate affirmance is "void" because a state-court appellate judge had an interest in the case "which worked his disqualification" and that of the entire panel with whom he deliberated. However, the Eleventh Circuit decision contrastingly foreclosed consideration of whether the allegations of fact in Miriam Donner's complaint "support or tend to support the charge."

That holding is of course entirely consistent with the foregoing analysis of *Rooker* and *Feldman*. In *dicta*, *Johnson*, 512 U.S. at 1005-1006, additionally recognized that doctrine's prohibition against seeking "appellate review of the state judgment..." in federal district court. The fact that Miriam Donner's complaint does not violate that prohibition has already been fully discussed *ante*.

CONCLUSION

Wherefore, the petition should be granted.

Respectfully submitted,

Miriam Donner, *pro se*
P.O. Box 1232
Hallandale, FL 33009

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-13530
Non-Argument Calendar

D. C. Docket No. 99-08593-CV-DMM

MIRIAM DONNER,

Plaintiff-Appellant,

versus

EDWARD DONNER, MARK DONNER, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Florida

---

(March 12, 2001)

Before ANDERSON, Chief Judge, CARNES and MARCUS, Circuit Judges.
PER CURIAM:

Plaintiff Miriam Donner appeals the district court's dismissal of her civil action for declaratory relief against William Donner, Edward Donner, and Mark Donner, as personal representative of the Estate of Charles Donner, and the Fourth District Court of Appeals of Florida. Plaintiff argues that the district court erred in dismissing her claim based on the Rooker-Feldman doctrine. Because we find that the district court correctly applied the Rooker-Feldman doctrine, we affirm.

Background Facts

In 1976, Miriam Donner lost her lawsuit in a Florida circuit court claiming separate maintenance from Charles Donner, because the court determined that she and Charles Donner had never been husband and wife. Following this decision, Plaintiff appealed to the Fourth District Court of Appeals, which affirmed the decision. The Supreme Court of Florida subsequently denied certiorari. Twenty-five years later, in 1997, Plaintiff discovered that one of the judges on the Fourth District Court of Appeals that heard her initial appeal had joined a law firm that had represented Charles Donner just six days after the original opinion issued. Based on this evidence, Plaintiff filed a motion to have the state appellate court recall its mandate, but the court denied this motion noting that it was without jurisdiction to recall a mandate beyond the term of the court when the mandate was issued. Plaintiff moved for rehearing and rehearing en banc of this order, and then petitioned for certiorari by the Florida Supreme Court and the United States Supreme Court. All of these requests were denied. In addition, Plaintiff sought a writ of mandamus from the Florida Supreme Court, which was denied.

Discussion

We review the district court dismissal for lack of subject matter jurisdiction de novo. Woodruff v. U.S. Dep't of Labor, 954 F.2d 634, 636 (11th Cir. 1992).

Under the Rooker-Feldman doctrine, federal district courts do not have subject matter jurisdiction when a plaintiff seeks review of a state court judgment. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 44 S.Ct. 149, 150 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S.Ct. 1303, 1315 (1983). This doctrine applies to claims that were raised in state court as well as claims that were not raised but could have been in an earlier state proceeding. See Powell v.

Powell, 80 F.3e 464, 467 (11th Cir. 1996). Thus, the primary exception to the doctrine is when a plaintiff did not have a "reasonable opportunity" to raise the issue in the state proceeding. Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983).

In Wood v. Orange County, the plaintiffs challenged the procedure used to attach a lien against their property. See id. at 1544. The defendants argued that the plaintiff's claim should be dismissed under Rooker-Feldman because the plaintiffs could have made their constitutional challenge to the judgment that created the lien in state court. See id. at 1548. This Court rejected that argument because the plaintiffs did not receive actual notice of the judgment until well after the time for appeal had elapsed. See id. The defendants also argued that the plaintiffs could have raised their objections by filing a motion to set aside the judgment creating the lien. See id. The court also rejected this argument--this time on the ground that the motion to set aside is "not a substitute for an appeal." Id. It acts as "a special kind of collateral attack on, rather than an appeal of, the judgment." Id. Thus, it did not matter that the plaintiffs could have raised their claims in the motion to set aside because those proceedings were not part of the appellate review of the original judgment. See id. In conclusion, this Court held that because the plaintiffs did not have a reasonable opportunity to raise their claims in the trial court or on appeal of the judgment, the federal district court's exercise of jurisdiction would not usurp the state appellate court's or the United States Supreme Court's appellate jurisdiction of the constitutional issues presented. See id.

The Court has also noted that even when an issue is presented, if that court does not have the ability to consider the issue fully on its merits, Rooker-Feldman preclusion does not apply. See Biddulph v. Mortham, 89 F.3d 1491 (11th Cir. 1996). The plaintiffs in Biddulph v. Mortham sought a writ of mandamus asking the Florida Supreme Court to review a decision by the Secretary of State. See id. at 1494. The court

denied the petition, and the plaintiff filed suit in federal district court making the same federal claim. See id. at 1495. This Court decided that because the Florida Supreme Court had strictly limited authority only to grant a mandamus in cases where there is a right to the performance of a right that is indisputably clear, the "reasonable opportunity" exception should apply. See id. at 1495 n. 1. In other words, since the plaintiff did not have a fair opportunity to have the claim considered by a state court, the federal district court was not exercising appellate review of any state court decision.

Plaintiff maintains that she never received a reasonable opportunity to litigate her due process claim in the state courts. Unlike the plaintiffs in Woods that were not even aware that a lien had been placed on their property, Miriam Donner had notice of the judicial proceedings in which she was participating. The names of the judges on the panel of the Fourth District Court of Appeals were obviously known to her and, according to her own admission, she could have discovered that the law firm had filed articles of amendment with the secretary of state, making the former judge a named partner. With this information, Plaintiff could have included her due process claims in a petition for rehearing or in a petition for certiorari, both of which are part of the appellate review referred to in Wood. While Plaintiff may not have had actual knowledge of the judge joining the law firm, she at least had a reasonable opportunity to learn the facts necessary to bring her due process challenge. Resources of a party making an appeal are limited. Just because Plaintiff did not investigate the potential grounds for the judges recusal does not mean that she did not have a reasonable opportunity to do so.

Because Plaintiff had a reasonable opportunity to present her constitutional claims, Rooker-Feldman preclusion opportunity to present her constitutional claims, Rooker-Feldman preclusion was appropriate. Accordingly, we AFFIRM.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-13530-AA

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 13, 2001
THOMAS K. KHAN CLERK

MIRIAM DONNER,

Plaintiff-Appellant,

versus

EDWARD DONNER, MARK DONNER, WILLIAM DONNER, as personal representatives of the Estate of Charles Donner, deceased
4th COURT OF APPEALS,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, ___F.2d____)

Before: ANDERSON, Chief Judge, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel or other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

S/_____

CHIEF JUDGE

ORD-42

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 99-8593-CIV-MIDDLEBROOKS

MIRIAM DONNER,

Plaintiff,

vs.

EDWARD DONNER, MARK DONNER, and WILLIAM DONNER, as personal representatives of the Estate of Charles Donner, deceased, and DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT,

Defendants.
_____/

FILED BY AM D.C.
JUN 01 2000
Clarence Maddox
Clerk U.S. Dist.
Ct. S.D. of Fla.

ORDER DENYING MOTION TO VACATE

THIS CAUSE comes before the Court upon Plaintiff's Motion to Vacate. DE #38. The Court has reviewed the motion and is otherwise fully advised in the premises.

In this motion, Plaintiff moves the Court to vacate its order dismissing this case for want of jurisdiction pursuant to the *Rooker-Feldman* doctrine. In this motion, Plaintiff argues that the order should be vacated because the *Rooker-Feldman* doctrine is inapplicable to the facts of this case. We do not agree and therefore deny Plaintiff's motion.

Despite Plaintiff's attempts to shoehorn this case into several of the exceptions to the doctrine, based upon our review of the case law and the facts of this case we conclude that this

Court is without jurisdiction to hear this case. Indeed, at the heart of this case is Plaintiff's accusation that her constitutional rights were violated by the acts of the Florida State Court system in a 1977 divorce proceeding. She presented these claims to the state court in 1997 and was denied the requested relief. After this denial, Plaintiff appealed the denial to the Florida appellate courts and the United States Supreme Court and was agains denied relief. Plaintiff then filed this case, claiming that the 1977 acts violated her constitutional rights. Accordingly, she is in effect appealing the 1997 state court decision denying her relief on her claims concerning the 1977 decision to the district court. Such an attempt is in direct violation of the *Rooker-Feldman* doctrine. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's motion to vacate, DE # 38, is DENIED.

s/_____
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

copies to counsel of record, Miriam Donner, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 99-8593-CIV-MIDDLEBROOKS

MIRIAM DONNER,

Plaintiff,

vs.

EDWARD DONNER, MARK DONNER, and WILLIAM DONNER, as personal representatives of the Estate of Charles Donner, deceased, and DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT,

Defendants.
_____/

ORDER DISMISSING CASE FOR WANT OF JURISDICTION

THIS CAUSE comes before the Court upon Defendant, Fourth District Court of Appeal's, Motion to Dismiss, filed on August 30, 1999. DE @21. Finding that this Court is without jurisdiction, we dismiss this action.

I.

On August 2, 1999, Plaintiff filed a complaint with this Court alleging violation of her civil rights pursuant to 42 U.S.C § 1983. The essence of Plaintiff's claim is that the Fourth District Court of Appeal violated her constitutional rights by virtue of

its December 23, 1997 decision denying her motion to recall a 1977 mandate. Plaintiff is seeking declaratory relief that the merits of a 1976 appeal remain pending for resolution. Although it is unclear as to whether Plaintiff is seeking monetary damages, it appears the complaint is more accurately described as a petition for mandamus.

II.

Although 28 U.S.C. §§ 1331 and 1343(3) appear to create federal court subject matter jurisdiction in all § 1983 cases, there are a few situations where jurisdiction does not exist. This case presents such a situation. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1924), the plaintiffs attempted to have a state court judgment declared null and void. The Supreme Court held that the federal district courts have no jurisdiction to "entertain a proceeding to reverse or modify" a state court judgment. *Id.* In defining the scope of this doctrine the Supreme Court explained that a district court does not have "jurisdiction ... over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485 (1983). Thus the Supreme Court has instructed that, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court based on the losing party's claim that the state judgment itself violated the loser's federal rights." *Johnson v. DeGrandy*, 512 U.S. 997, 1005-6 (1994).

This is clearly the case here. The basis of Plaintiff's Complaint is that the state appellate court deprived her of her constitutional rights by refusing to recall its 1978 mandate. Instead of availing herself to the rules of appellate procedure, Plaintiff filed this action challenging the constitutionality of the state court's judgment. As such, under the *Rooker-Feldman* Doctrine, this Court is without jurisdiction over this matter.

III.

For the reasons stated above, it is

ORDERED AND ADJUDGED that this action is DISMISSED for want of jurisdiction. The Clerk of the Court is instructed to CLOSE this case and all pending motions.

DONE AND ORDERED in Chambers, at Miami, Florida, this 23rd day of September 1999.

s/_____
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

copies to counsel of record, Miriam Donner, *pro se*

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT,
JULY TERM 1977

MIRIAM DONNER,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 76-1708
	)	
CHARLES DONNER,	)	
	)	
Appellee.	)	

Decision filed August 9, 1977

Appeal from the Circuit Court
for Broward County;
Thomas J. Reddick, Jr., Judge

Miriam Donner, Hallandale,
pro se.

L. J. Cushman of Cushman & Cushman,
Miami, for appellee.

PER CURIAM.

AFFIRMED.

ALDERMAN, C.J., MAGER and DAUKSCH, JJ.,
concur.

CONCLUSION

Wherefore, the petition should be granted.

Respectfully submitted,

Miriam Donner, *pro se*
P.O. Box 1232
Hallandale, FL 33009[6]

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[6]Prepared with assistance of counsel.